

MASSACHUSETTS
BOARD OF APPEALS

Decision on the Application by Blanchard Place LLC for a Comprehensive Permit

**Decision 06-02
September 27, 2006**

I. APPLICANT AND PUBLIC HEARING

1. Pursuant to notice duly mailed, published and posted, a public hearing was held by the Acton Zoning Board of Appeals (the "ZBA") at the Acton Senior Center, 50 Audubon Hill, Acton, Massachusetts, on March 15 2006, commencing at 7:30 p.m., upon the application of Blanchard Place LLC, a Massachusetts limited liability company (the "Applicant") for a comprehensive permit under Massachusetts General Laws ("MGL") Chapter 40B, §20-23 ("the Act") and under Town of Acton Zoning By-Laws (the "Zoning Bylaw"), to build low or moderate income housing in a development of 12 condominium units in 3 buildings (the "Project") on approximately 2.9 acres of land located at 139 Prospect Street in Acton and identified as Parcel 129 on Assessor's Map F2 (the "Site"). The ZBA conducted a view of the premises on May 6, 2006, at 9:00 AM and held continued public hearings on April 27, 2006, June 1, 2006, June 22, 2006, July 19, 2006, August 3, 2006, August 22, 2006, September 13, 2006 and September 27, 2006. The ZBA closed the public hearing on September 27, 2006, and began its deliberations on September 27, 2006.

2. The ZBA has issued this Decision within the time frame specified in MGL Chapter 40B, §20-23.

3. Detailed minutes were taken of all sessions. The minutes and exhibits are available for public inspection in the ZBA's offices. A list of the Exhibits is contained in the record.

4. Throughout the public hearing the Applicant was represented by Julian James D'Agostine, III of Blanchard Place LLC.

5. Sitting as members of the ZBA and present throughout the hearing were David Black (Acting Chair), Kenneth Kozik (Member) and William Sawyer (Alternate Member).

II. NATURE OF THIS PROCEEDING

6. In conducting its hearings in this matter, the ZBA is guided by the decision of the Supreme Judicial Court in Dennis Housing Corp. v. Board of Appeals of Dennis, 439 Mass. 71, 76-77 (2003) (citations omitted), that a qualified developer proposing to build low or moderate income housing:

... may submit to the zoning board of appeals “a single application to build such housing in lieu of separate applications to the applicable local boards.” The zoning board is then to notify those “local boards” for their “recommendations” on the proposal; the zoning board may “request the appearance” of representatives of those “local boards” at the public hearing as may be “necessary or helpful” to the decision on the proposal; and the zoning board may “take into consideration the recommendations of the local boards” when making its decision ... The zoning board then has “the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application,” ... and in some circumstances, has the power to override requirements or restrictions that would normally be imposed by those local boards. ... If the zoning board denies the application for comprehensive permit, or approves it only on conditions that make the project “uneconomic,” the applicant may appeal to the housing appeals committee ... which also has the power to override local regulations and direct the issuance of a comprehensive permit.¹

7. Any person aggrieved by the issuance of a comprehensive permit has a right of appeal to the Superior Court under Section 17 of the Zoning Act (MGL Chapter 40A).

III. GOVERNING LAW

(1) The Low and Moderate Income Housing Act (MGL Chapter 40B)

8. The law governing this case is The Low and Moderate Income Housing Act, Massachusetts General Laws Chapter 40B, §20-23 (“the Act”), and the regulations promulgated by the Department of Housing and Community Development (“DHCD”) Housing Appeals Committee, 760 CMR 30.00ff and 31.00ff (the “Regulations”).

9. The Act prevents the possible use by cities and towns of exclusionary local bylaws to shut out needed low and moderate income housing, Board of Appeals of Hanover v. Housing Appeals Committee 363 Mass. 339 (1973). The purposes of the Act are satisfied if (a) a town has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census or which is on sites comprising 1.5% or more of the town’s total land area zoned for residential, commercial, or industrial use,

¹ The Housing Appeals Committee’s decision itself is further reviewable by the Superior Court in accordance with the State Administrative Procedure Act, Massachusetts General Laws Chapter 30A.

or (b) if the application results in the commencement of low and moderate income housing construction on sites comprising more than 0.3% of such total area or 10 acres, whichever is larger, in one year. See, e.g., Arbor Hill Holdings Limited Partnership v Weymouth Board of Appeals, Housing Appeals Committee No. 02-09 (9/24/03).

10. Acton does not presently meet any of these criteria. However, any decision on this Application would still be “consistent with local needs” under Chapter 40B because the Town has a certified Affordable Housing Plan under DHCD’s Planned Production regulations.

(2) Certification of Acton’s Affordable Housing Plan

11. When a plan for production of affordable housing has been certified by DHCD, and a Board of Appeals decision under the Act is appealed to the Housing Appeals Committee (“HAC”) during the period of the certification, the Regulations provide an irrebuttable presumption that the decision is consistent with local needs. The period of certification lasts for one or two years following the certification, 760 CMR 31.07(1)(i).

12. During the period of such certification, HAC review of an appealed comprehensive permit decision is limited to “the question of whether the planned production requirements have been met” and related procedural matters. Alexander Estates, LLC v. Billerica Board of Appeals, HAC Ruling 05-14 (March 27, 2006).

13. During the course of this hearing, Acton’s Affordable Housing Plan was certified by DHCD for a two year period beginning on December 31, 2005 and ending on December 30, 2007 (DHCD Letter to Acton Board of Selectmen, April 25, 2006).

14. The Regulations allow a Board of Appeals to exercise its discretion during the period of certification. Specifically, 760 CMR 31.01(1)(i)7.b applies to a two year certification:

The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of two years from any certification, if, in the year for which certification is sought, the municipality has increased its low and moderate housing stock by at least 1.5% of total housing units.

IV. JURISDICTIONAL ELEMENTS (760 CMR 31.01(1) and 31.02(1))

15. Pursuant to the Act and the Regulations, an applicant for a comprehensive permit must fulfill three initial jurisdictional requirements:

- a) The applicant must be a public agency, a non-profit organization, or a limited dividend organization;

- b) The project must be fundable by an authorized subsidizing agency under a low and moderate income housing subsidy program; and
- c) The applicant must “control the site” 760 CMR 31.01(1)

16. As discussed more fully below, the ZBA finds that the Applicant has provided sufficient information to meet these jurisdictional requirements.

(1) Status of Applicant

17. Pursuant to the Regulations, an applicant for a comprehensive permit must be either a public agency, a non-profit organization, or a limited dividend organization, 760 CMR 31.01(1)(a). The Applicant has satisfied this criterion by forming a limited dividend organization which shall agree to legally bind itself to limit the profit it derives from a comprehensive permit development. Satisfaction of this criterion shall be accomplished through the execution of a Regulatory Agreement between the subsidizing agency and the Applicant. The Regulatory Agreement at a minimum shall stipulate that the Applicant’s profit from the development is limited to 20% of the development costs, and shall provide mechanisms to enforce this requirement. See Conditions G.5 and G.6 below.

18. In the application submitted to the ZBA, the Applicant is identified as Blanchard Place LLC, a Massachusetts limited liability company, which has a principal place of business at 411 Massachusetts Avenue, Suite 304, Acton, MA 01720, and whose principal member is Julian James D’Agostine, III. Accordingly, for purposes of this application, the ZBA considers Blanchard Place LLC to be the sole Applicant under this application. The ZBA has incorporated conditions below to ensure that this entity complies with the jurisdictional requirements of the Regulations and will execute a suitable Regulatory Agreement pursuant to this comprehensive permit.

(2) Public Subsidy Requirement

19. A housing development being proposed under a comprehensive permit application must be subsidized under a low and moderate income housing subsidy program. Here, the Applicant has submitted a project eligibility letter dated December 30, 2005, from the Massachusetts Department of Housing and Community Development to the Applicant and the Acton Board of Selectmen. That letter includes DHCD’s determination of site eligibility and preliminary approval under the Local Initiative Program (LIP) for low and moderate income housing.

20. The ZBA finds that this project eligibility letter substantially complies with the project subsidy requirement set forth in the Regulations, 760 CMR 31.01(2).

(3) Site Control Issues

21. To be eligible to obtain a comprehensive permit under Chapter 40B, an applicant must demonstrate that it holds legal title to the property that is the subject of the application, or that it otherwise has a sufficient legal right to acquire title to the property, such as under a purchase and sale agreement.

22. The Applicant does not currently hold legal title to the Site, and the initial application failed to demonstrate any right of the Applicant to acquire legal title to the Site. In accordance with 760 CMR 31.01(5), the ZBA directed the applicant to work with counsel to the ZBA ("Town Counsel") in order to resolve the site control issues. The ZBA extended the time period for remedy of this jurisdictional defect to in excess of 120 days (760 CMR 31.01(5) requires only a 60 day minimum) to facilitate resolution of the unusually complex set of site control issues for this Site.

23. The Applicant has provided the ZBA and Town Counsel with satisfactory evidence of its right to purchase the Site. Accordingly, the ZBA finds that, as of the date of issuance of this comprehensive permit, the Applicant has demonstrated that it has a sufficient legal right to acquire title to the Site. The Applicant shall acquire title to the Site before beginning construction under this comprehensive permit, see Condition B.1.d below.

24. The Site is subject to a *lis pendens*. The applicant shall file a Release of said *lis pendens* before beginning construction under this comprehensive permit, see Condition B.1.d below.

25. The Site is traversed by a way shown on a plan of land entitled "Land in Acton Owned by the Estate of Charles W. Spencer" compiled by Harlan E. Tuttle, Surveyor, dated March 29, 1957, and recorded with the Middlesex South District Registry of Deeds in Book 8949, Page 587. The way is shown as an "Abandoned Road" on said plan. The Town of Acton abandoned the road in 1916. To the extent that rights to pass over the portion of this Abandoned Road on the Site continue to exist, and that the exercise of any such rights becomes necessary, the Applicant shall undertake to relocate any easement that provides such rights on the Site so as to permit the exercise of said rights as outlined in M.P.M Builders, LLC v. Dwyer, 442 Mass. 87, 809 N.E 2nd 1053 (2004), see Condition D.6 below.

26. The Applicant shall provide evidence that title insurance protection is available to condominium purchasers. The title insurance shall provide affirmative coverage to insure against forced removal of structures on the premises without exception to any matters related to the "Abandoned Road", see Condition D.7 below.

V. APPLICATION REQUIREMENTS

27. The ZBA finds that the submitted application substantially complies with the ZBA's comprehensive permit application requirements as stated in the Town of Acton's "Rules and Regulations for Comprehensive Permits" Adopted May 17, 2004.

VI. SUMMARY OF DECISION

28. For the reasons stated below, the ZBA approves with the conditions set forth below, the application of Blanchard Place LLC, for a comprehensive permit for the Project consisting of a twelve (12) unit condominium development in three buildings, each consisting of four units, under the Act.

VII. THE PROJECT

29. The Project Site as defined in the initial application consists of 2.9 acres of land located at 139 Prospect Street in Acton and identified as Parcel 129 on Assessor's Map F2 (the "Site").

30. On or about February 15, 2006, Blanchard Place LLC filed an application for a Comprehensive Permit (the "Application") to build low or moderate income housing in a development of 12 condominium units consisting of three buildings, each containing four units, at the Site.

31. The project plans were revised over the course of the hearing to address issues as they arose. The plans for the Project on which this approval with conditions is based (the "Plans") are entitled "Blanchard Place" A Proposed Comprehensive Permit Project in Acton Massachusetts dated July 31, 2006, and consist of the following sheets:

Firm	Sheet	Title	Revision
Foresite Engineering Associates	1 of 12	Title Sheet	7/31/06
Foresite Engineering Associates	2 of 12	Master Plan	7/31/06
Foresite Engineering Associates	3 of 12	Record Plan	7/31/06
Foresite Engineering Associates	4 of 12	Natural Features & Existing Conditions	7/31/06
Foresite Engineering Associates	5 of 12	Site Development Plan	7/31/06
Foresite Engineering Associates	6 of 12	Construction Details 1 of 3	7/31/06
Foresite Engineering Associates	7 of 12	Construction Details 2 of 3	7/31/06
Foresite Engineering Associates	8 of 12	Construction Details 3 of 3	7/31/06
Kim Ahern Landscape Architects	9 of 12	Landscaping Plan 1 of 2	7/31/06
Kim Ahern Landscape Architects	10 of 12	Landscaping Plan 2 of 2	7/31/06
Foresite Engineering Associates	11 of 12	Erosion & Sedimentation Control Plan 1 of 2	7/31/06
Foresite Engineering Associates	12 of 12	Erosion & Sedimentation Control Plan 2 of 2	7/31/06
Integrity Design	n/a	Front Elevation Units 1-4	7/27/05
Integrity Design	n/a	Left & Right Elevations Units 1-4	7/27/05
Integrity Design	n/a	Back Elevation Units 1-4	7/27/05

Integrity Design	n/a	Basement Plan Units 1-4	7/27/05
Integrity Design	n/a	First Floor Plan Units 1-4	7/27/05
Integrity Design	n/a	Second Floor Plan Units 1-4	7/27/05
Integrity Design	n/a	Third Floor Plan Units 1-4	7/27/05
Integrity Design	n/a	Cross Section Units 1-4	7/27/05
Integrity Design	n/a	Sectional Details Units 1-4	7/27/05
Integrity Design	n/a	Front Elevation Units 5-8	7/27/05
Integrity Design	n/a	Left & Right Elevations Units 5-8	7/27/05
Integrity Design	n/a	Back Elevation Units 5-8	7/27/05
Integrity Design	n/a	Foundation Plan Units 5-8	7/27/05
Integrity Design	n/a	Entry Level Plan Units 5-8	7/27/05
Integrity Design	n/a	Second Level Plan Units 5-8	7/27/05
Integrity Design	n/a	Third Level Plan Units 5-8	7/27/05
Integrity Design	n/a	Fourth Level Plan Units 5-8	7/27/05
Integrity Design	n/a	Cross Section Units 6-7	7/27/05
Integrity Design	n/a	Sectional Details Units 5-8	7/27/05
Integrity Design	n/a	Front Elevation Units 9-12	7/27/05
Integrity Design	n/a	Left & Right Elevations Units 9-12	7/27/05
Integrity Design	n/a	Back Elevation Units 9-12	7/27/05
Integrity Design	n/a	Entry Level Plan Units 9-12	7/27/05
Integrity Design	n/a	Second Level Plan Units 9-12	7/27/05
Integrity Design	n/a	Third Level Plan Units 9-12	7/27/05
Integrity Design	n/a	Fourth Level Plan Units 9-12	7/27/05
Integrity Design	n/a	Cross Section Units 9-12	7/27/05
Integrity Design	n/a	Sectional Details Units 9-12	7/27/05

32. The final Project for which this comprehensive permit is granted with conditions consists of twelve (12) condominium units in three buildings, each containing four units, at the Site.

VIII. CONCLUSORY FINDINGS

33. Based on the evidence presented by the Applicant, local boards and officials, and interested parties at the public hearings, the ZBA finds as follows:

- a) Acton does not presently have sufficient low or moderate income housing to meet Chapter 40B's minimum criteria. Acton does, however, presently benefit from DHCD certification of its Affordable Housing Plan under the Planned Production Regulations, 760 CMR 31.07(i).
- b) The proposed 12-unit Project (as depicted on Plans) will, when conforming to the conditions set forth in this Decision, adequately provide for traffic circulation, storm water drainage, sewerage, and potable water, without an undue burden on the occupants of the Project or on the surrounding neighborhood or the Town.

- c) The proposed 12-unit Project will, when conforming to the conditions in this Decision, not be a threat to the public health and safety of the occupants of the Project, the neighborhood, or the Town.
- d) The proposed Project on the Site is supported by the evidence, and as conditioned below, (i) would not be rendered uneconomic by the terms and conditions of this decision, and (ii) would represent a reasonable accommodation of the need for low and moderate income housing.
- e) The proposed Project is a Local Initiative Program project that has been developed in cooperation with the Town of Acton, and is supported by the Acton Board of Selectmen, the Acton Community Housing Corporation and the Acton Planning Board.

34. Therefore, the ZBA finds that it is an appropriate exercise of its discretion in accordance with the Planned Production Regulations, 760 CMR 31.07(i) to approve this comprehensive permit with the conditions below.

IX. WAIVERS FROM LOCAL BYLAWS AND REGULATIONS

(1) Acton Zoning Bylaw

35. The Applicant has requested waivers from the following Zoning Bylaw provisions:

- a) Section 3.3, to allow more than one residential building on a lot. The Project calls for three buildings to be located on a lot.
- b) Section 3.3.5, to allow multifamily dwellings in an R-2 district. The proposed buildings contain four units each.

36. The ZBA has received letters of support for this Local Initiative Program project from the Acton Board of Selectmen, the Acton Community Housing Corporation and the Acton Planning Board. The Project is within walking distance of the Kelly's Corner area of Acton, an area in which the Town of Acton wishes to focus development.

37. The ZBA finds that the increased density of this Project is reasonable for affordable housing on this Site. Therefore, the ZBA grants the waivers required by the Plans from Sections 3.3 and 3.3.5 of the Zoning Bylaw subject to the conditions of this Decision.

(2) Acton Wetland Protection Bylaw

38. The Site contains extensive wetlands that include a vernal pool. The wetlands consist of a vernal pool and extensive associated wetlands on the eastern portion of the Site, plus an area of Bordering Vegetated Wetland (BVW) along the southern

portion of the western area of the Site. The developable area is thus limited to the northern portion of approximately the western half of the Site, adjacent to Prospect Street.

39. The Applicant originally filed an Abbreviated Notice of Resource Area Delineation (ANRAD) with the Acton Conservation Commission in 2002. The wetlands boundaries were flagged on the Site and approved by the Conservation Commission in an Order of Resource Area Delineation (ORAD) in April 2002.

40. Shortly before the expiration of the ORAD, the Applicant submitted a Notice of Intent (NOI) to the Conservation Commission on April 8, 2005. The NOI was for a Chapter 40B comprehensive project, and hence requested a hearing solely under the Massachusetts Wetlands Protection Act, and not under the Town of Acton Wetland Bylaw. The Acton Conservation Commission prefers that all development in town adhere to the Acton Wetland Bylaw, but the timing of the NOI prior to submission of a comprehensive permit application required the Conservation Commission to proceed solely under the state Wetlands Protection Act.

41. The Conservation Commission issued an Order of Conditions on June 15, 2005. That Order was appealed to the Massachusetts Department of Environmental Protection (DEP) by abutters. A Superseding Order of Conditions was issued by DEP on November 30, 2005 incorporating an agreement between the Applicant and the abutters. That Superseding Order of Conditions remains in force, and is not disturbed by this comprehensive permit decision. The Applicant shall request that the Superseding Order of Conditions be amended if and as necessary to conform to the Project as approved. The Applicant and the Project shall comply with the final Superseding Order of Conditions.

42. The Conservation commission focused on protection of the vernal pool on the eastern portion of the Site in its original hearing, deferring protection for the wetlands along the southern side of the Site to the comprehensive permit hearing before the ZBA. The Conservation Commission accordingly raised wetlands protection concerns with the ZBA during the course of this hearing. These concerns were also raised by residents in the area of the Site.

43. The Applicant initially requested a blanket waiver from all provisions of the Acton Wetland Protection Bylaw and associated Rules and Regulations. The initial plans proposed a retaining wall within 2 feet of delineated wetlands.

44. The Acton ZBA has a long-standing policy of not granting blanket waivers in comprehensive permits. The ZBA expects affordable housing developments to comply with local Bylaws, Rules and Regulations to the extent feasible, and to request only those waivers truly necessary to the economic construction and operation of a proposed project². Accordingly, the Applicant was directed to prepare a more specific waiver request and encouraged to consult the Acton Conservation Commission.

² The ZBA expects that to the extent possible, requests for waivers will be limited to requests that are necessary and sufficient to avoid "conditions and requirements [that] make the building or operation of

45. The Conservation Commission's input to the ZBA took strong exception to the lack of wetlands protection in the original plans submitted with the application. The Conservation Commission described the placement of a retaining wall within 5 feet of wetlands as "the most egregious case of ignoring the Town's setbacks that the Commissioners can recall," and requested significant improvements in wetlands protection.

46. Acton's Wetland Bylaw would normally require a 100-foot no-disturb setback around a vernal pool, plus 50-foot no-disturb and 75-foot no-structure setbacks from the BVW. The Superseding Order of Conditions provides for 50-foot no-disturb and 75-foot no-structure setbacks from the vernal pool, but contains no other wetland protection setbacks. The Superseding Order of Conditions is the embodiment of state wetlands protection requirements for the Site.

47. Based on evidence of the value of wetlands submitted and developed during the hearing, and Acton's record of local wetlands regulation, the ZBA finds that Acton has a strong local need for wetlands protection. Based on Acton's record of wetlands protection regulation, the ZBA finds that the Acton Wetland Protection Bylaw exceeds the requirements of state law, and that this higher level of requirements is generally imposed on all development in Acton by the Conservation Commission. The ZBA therefore finds that it is reasonable to impose requirements on this Project beyond the Superseding Order of Conditions, and has done so (see Conditions section L).

48. In accordance with the requirement in the Act and Regulations to balance the need for affordable housing against other local needs, the ZBA discussed the possibility and value of increased wetlands setbacks with the Applicant and the Conservation Commission during the hearing. The ZBA recognized that full enforcement of the Acton Wetland Bylaw's 50-foot no-disturb and 75-foot no-structure setbacks would render the Project infeasible, and further that full enforcement of these setbacks would be difficult, as the existing garage on the Site is within 50 feet of the BVW, and that garage will need to be removed as part of the Project.

49. The ZBA has received evidence that value of increasing wetlands setback decreases with distance (e.g., the first 10 feet of setback is significantly more valuable than the second 10 feet). Based on this evidence, the ZBA requested that the Applicant modify the Project to improve wetlands protection. The Applicant produced a modified design that achieves a 25-foot separation from the majority of the BVW, decreasing to a minimum of 20-feet in limited areas where the boundary of the BVW veers north towards the developable area of the Site.

50. The Fire Chief's review of the modified design determined that it provided inadequate emergency vehicle access to the rear of the Project. A slight modification to the design obtained sufficient access – at the crucial point for this access there is no space

such housing uneconomic" MGL Ch.40B §§22-23. While blanket waivers are sufficient, they are in general not necessary for this purpose.

to spare in the design between the 20-foot wetland setback to the south and the standard 10-foot side yard setback to the north.

51. The ZBA has applied the balancing analysis envisioned in the Act and Regulations and finds that for this Project on this Site at this time under these circumstances, the setbacks described in paragraph 49 above are an appropriate balance between needs for affordable housing and for wetlands protection. These setbacks are close to the maximum achievable, as the tight fit described in paragraph 50 above indicates that further setback increases risk rendering the project infeasible.

52. Therefore the ZBA grants the following waivers required by the Plans from Acton's Wetland Bylaw subject to the conditions in this Decision:

- a) Sections 3.2(2) and 3.2(3): The 50-foot setback of undisturbed natural vegetation and 75-foot setback to the edge of driveways, roadways and structures are waived to allow a 25-foot separation from the majority of the BVW, decreasing to a minimum of 20-feet in limited areas where the boundary of the BVW veers north towards the developable area of the Site, as shown on the Plans.
- b) Section 3.2(4): The 50-foot chemical free area is waived to permit chemical use for maintenance purposes, control of snow and ice, and other reasonable and customary uses on pavement shown on the Plans that is within 50 feet of wetlands.
- c) Section 3.2(6): The 100-foot setback of undisturbed natural vegetation from the mean high water line for vernal pools has been overridden by the Superseding Order of Conditions, and is therefore waived. The setbacks in the Superseding Order of Conditions shall be complied with in accordance with said Superseding Order.

(3) Waivers Not Listed

53. By granting the waivers from local bylaws and regulations listed above, it is the intention of this Comprehensive Permit to permit construction of the Project as shown on the final Approved Plans. If, in reviewing the Applicant's building permit application(s), the Building Commissioner determines that any additional waiver from local zoning, wetlands, health, or subdivision regulations is necessary to permit construction to proceed as shown on the final Approved Plans, the Building Commissioner shall proceed as follows: (a) any matter of *de minimis* nature shall be deemed within the scope of the waivers granted by this Comprehensive Permit; and (b) any matter of a substantive nature, including those having a potential adverse impact on public health, safety, welfare or the environment shall be reported back to the ZBA for expeditious disposition of the Applicant's request for a waiver therefrom.

X. MATTERS NOT SUBJECT TO WAIVERS

(1) Abandoned Road

54. The initial application proposed to establish a wood chip path over the course of the Abandoned Road to Massachusetts Avenue (Route 111). On the advice of the Acton Engineering Department, this was revised to be a stone dust path.

55. Subsequent title investigation has indicated that ownership of the Site does not include any right to establish such a path. Elimination of this path also improves wetlands protection, as the path (and hence work to establish it) would necessarily be within 5 feet of wetlands at the rear of the Site that are part of the vernal pool ecosystem.

56. For these reasons, the ZBA does not require creation or maintenance of a path to Massachusetts Avenue (Route 111) as part of this decision.

(2) Off-Site Surface Runoff

57. During the course of the hearing, residents in the area of the Project raised concerns about possible contribution of the Project to increased off-site surface runoff and flooding across Prospect Street to the west.

58. The Water Budget and Drainage Report submitted by the Applicant indicate that the Project is projected to reduce surface runoff by comparison to existing conditions for the 2, 10, and 100 year design storms.

59. Acton experienced record high levels of precipitation during the period following the view of the premises up until approximately May 17, 2006. The precipitation caused flooding sufficient to close streets in Acton. Visual inspection of Prospect Street at the Site by members of the ZBA during this time period found no significant surface runoff from the Site onto Prospect Street and further found that the storm drains on Prospect Street in the vicinity of the Site were working properly.

60. Based on the evidence submitted and developed during the hearing, the ZBA finds that the Project should not increase surface runoff beyond existing conditions and that the Project should not cause flooding on Prospect Street. The Applicant is bound under the state Wetlands Protection Act and this Decision to adhere to the DEP Stormwater Management Policy and Guidelines, which expressly preclude any post-development increase in runoff from the Site.

61. During the hearing, an owner of the property abutting the Site to the north on Prospect Street presented evidence that storm water drains to a pool that crosses the stone wall separating the Site from his property. The property owner expressed a concern that the raising of the grade by the Project for the portion of this pool on the Site would reduce storm water storage, negatively impacting his property.

62. Based on the “Natural Features & Existing Conditions Plan” (sheet 4 in the plans submitted with the application), the lowest elevation of the ground on which this pool forms along the stone wall is between levels 216 and 217 (feet above sea level). The pool overflows towards both the vernal pool to the west and the wetlands to the south between levels 217 and 218 (feet above sea level).

63. The ZBA finds that limiting the pool height to level 217 is sufficient mitigation for storm water storage impacts along the northern boundary of the Site. At the ZBA’s request, the Applicant has revised the Project plans to include a drain inlet at level 217 in the stone wall along the north side of the site at the point of the lowest existing elevation of the ground along the stone wall. The drainage system fed by the inlet conducts water to the wetlands in the southern portion of the Site, thereby limiting the maximum depth of storm water pooling along the northern boundary of the Site. The ZBA also requires that this northern stone wall not be made impervious when the grade is raised (see Condition I.5) to provide an opportunity for water to infiltrate through the wall.

(3) Groundwater

64. During the course of the hearing, the ZBA received extensive comments (both at the hearing and via electronic mail and other correspondence) expressing concerns about high and/or rising groundwater in the neighborhood near the Project.

65. Acton’s public water supply is obtained from shallow wells that tap groundwater. Acton’s regulations and public policy reflect a local need to protect this groundwater, for example, Section 4.3.6.2 of the Acton Zoning Bylaw requires that all development in Acton not reduce groundwater recharge. The Acton Water District (provider of public water service to much of Acton, including the Site) considers rising groundwater to be generally good for Acton, as evidenced by the following text from the District Manager’s letter in the District’s Summer 2006 newsletter:

Right now we are in good shape. The water table is up and our overall demand for water to be used on lawns and gardens is down.

66. The ZBA finds that in general, groundwater recharge and rising groundwater levels are benefits to the public good in Acton. The Water Budget submitted by the Applicant projects an increase in the recharge rate after the Project, so that more water will be infiltrated into the ground by the Project than under existing conditions, thus benefiting the public good.

XI. CONDITIONS ATTACHED TO COMPREHENSIVE PERMIT

For the foregoing reasons, the ZBA grants the Application of Blanchard Place, LLC for a comprehensive permit for the Project consisting of 12 housing units on the Site under Chapter 40B, subject to each and every one of the following conditions:

A. General Conditions

- A.1 Prior to commencement of any construction concerning any portion of the Project (whether pursuant to a building permit or otherwise) the Applicant shall submit to the Building Commissioner a final set of Engineering Drawings and Architectural Plans for the Project which shall be identical to those cited in Section VII (above) of this Decision except that they shall be updated in accordance with the requirements of this Decision. The deadline for submission of said Plans may be extended by the Building Commissioner for good cause shown. The submission shall in addition include a list of the specific changes made to conform to the requirements of this Decision; this list and the final set of Engineering Drawings and Architectural Plans shall be signed and stamped by the Design Engineer. The Building Commissioner shall review the final set of Engineering Drawings and Architectural Plans to ensure that they are consistent with and in conformity with this Decision. Upon the Building Commissioner so finding, the ZBA shall endorse the final set of Engineering Drawings and Architectural Plans which shall thereupon constitute the final "Approved Plans" under this Decision and shall be filed with the records of the ZBA.
- A.2 In the event the Building Commissioner determines that the Applicant's construction drawings submitted with its building permit application(s) materially deviate from the final Approved Plans in such a manner that, in his professional opinion, they do not conform to the requirements and conditions imposed by this Comprehensive Permit Decision, the Building Commissioner shall notify the Applicant of the specific deviations, and the Applicant shall either bring the construction drawings into conformity with this Decision or seek modification of this decision in accordance with 760 CMR 31.03(3). In the event of a disagreement between the Building Commissioner and the Applicant with respect thereto, they shall notify the ZBA which shall thereupon determine whether the building permit construction drawings conform to this Decision. Upon finding that the building permit construction drawings (with any necessary revisions) do conform to this Decision, the ZBA shall endorse those construction drawings if so requested by the Applicant.
- A.3 This Decision shall be recorded at the Middlesex South District Registry of Deeds with Sheet 3 (the Record Plan) of the Approved Plans. This Decision shall become effective upon recording. Proof of recording shall be forwarded to the ZBA prior to issuance of a building permit or to the start of construction.

- A.4 The Applicant shall comply with all local rules and regulations of the Town of Acton and its boards and commissions unless expressly waived herein or as otherwise addressed in these conditions.
- A.5 The Applicant shall pay all fees of the Town of Acton imposed generally in respect of construction projects and for the purposes of monitoring compliance of the Project's building construction and occupancy in accordance with this Comprehensive Permit.
- A.6 The Applicant shall copy the ZBA and the Building Commissioner on all correspondence between the Applicant and any federal, state, or Town official, board or commission that concerns the conditions set forth in this Decision, including but not limited to all testing results, official filings and other permits issued for the Project.
- A.7 The Applicant shall comply with the State Building Code and any local regulations or fees of the Building Commissioner. The Applicant shall pay all required fees for all such building permits including any fees charged for inspections and permits.
- A.8 The Applicant shall maintain a copy of the endorsed Approved Plan and this Decision at the Site during construction.
- A.9 The Applicant shall obtain temporary easements or written permission from any abutting property owner if, during the course of construction, it becomes necessary to enter upon abutting land for construction or planting.
- A.10 Each condition in this Decision shall run with the land and shall, in accordance with its terms, be applicable to and binding on the Applicant and the Applicant's successors and assigns for as long as the Project and the use of the land does not strictly and fully conform to the requirements of the Acton Zoning Bylaw; and reference to these conditions shall be incorporated in the Master Deed and in each Unit Deed recorded for the Project and for any unit in the Project.
- A.11 This Decision permits the construction, use, and occupancy of twelve (12) housing units on the Site. The construction and use of the Site shall be in conformity with the Approved Plan, and there shall be no further subdivision of the Site, or the creation of additional housing units or any other structures or infrastructure except that which is shown on the Approved Plan, without further approval by the ZBA in the form of an amendment to this Decision.

B. Submission Requirements

- B.1 Pre-Construction Submissions: Before the Applicant begins any construction of the buildings and units in the Project, the Applicant shall have:
- a. Obtained, and filed with this ZBA a copy of, (a) a building permit from the Acton Building Commissioner pursuant to the Massachusetts State Building Code and (b) the construction drawings submitted to obtain said building permit;
 - b. Obtained, and filed with the ZBA a copy of any approvals from the Acton Board of Health which may be required under any statute, code, or rule and regulation affecting public health not otherwise preempted by Chapter 40B to the extent not otherwise expressly covered by this decision;
 - c. Delivered to the ZBA final architectural drawings for all buildings shown on the Plan, providing a scaled depiction of the front, rear and side elevations, signed by a registered architect;
 - d. Delivered to the ZBA a certified copy of the recorded deed transferring title of the Site to Blanchard Place LLC and a certified copy of the release of the *lis pendens*; and
 - e. Delivered to the ZBA copies of all correspondence with the DEP on plan and design changes subsequent to the Superseding Order of Conditions, including changes made during this hearing. The submission shall include all responses from the DEP. If the DEP objects and/or requires additional changes, the provisions of 760 CMR 31.03(3) shall be applied including prompt notification of the ZBA.
- B.2 As Built Plans: Prior to the occupancy or use of the final building constituting a part of the Project, the Applicant shall submit to the ZBA an "As Built Plan" showing all pavement, buildings, drainage structures, and other infrastructure as they exist on the Site, above and below grade, including appropriate grades and elevations. The plans shall be signed by a registered land surveyor or civil engineer, certifying that the Project as built conforms and complies with the conditions of this Comprehensive Permit. [The purpose of this provision is to facilitate the Building Inspector's review of the project for compliance with the comprehensive permit before the final occupancy permit is issued.]
- B.3 As Built Utilities Plan: An accurate as-built utilities plan and profile, showing actual in-ground installation of all utilities, shall be submitted to the Department of Public Works after completion of construction.

C. Site Development Construction Conditions

- C.1 The Applicant shall obtain all building permits and occupancy permits that may be required by the State Building Code.
- C.2 The Applicant shall ensure safe and convenient vehicular access to the Site during the entire duration of the Project. ZBA representatives shall be permitted access to the Site to observe and inspect the Site and construction progress until such time as the Project has been completed.
- C.3 The Applicant shall submit a construction and permitting schedule prior to the start of construction and bi-annually thereafter to the ZBA to assist in project status update and review.
- C.4 The Applicant shall file two complete sets of “progress submittals,” including design drawings, with the Acton Building Commissioner at each of the following milestones: 50% complete, and 100% complete. Progress submittals shall include any and all updated or revised design calculations supplementing the original design plans. The Building Commissioner’s and ZBA’s input and guidance are critical at these milestones. The Applicant may proceed to the next milestone unless the ZBA finds substantial deviations from the this Decision and the Approved Plan, in which case the ZBA shall give notice to the Applicant and the Applicant shall not proceed until the deviations are resolved in accordance herewith. The Applicant will be expected to provide a prompt and timely written response to any comments or questions posed by the ZBA or Building Commissioner at each milestone.
- C.5 The Applicant shall forward final architectural plans to the ZBA at the time of applying for building permits. All construction shall be inspected by the Building Commissioner and shall be in compliance with all Massachusetts State Building Code requirements.
- C.6 The Applicant shall provide temporary central mailbox units (CMU) for any project residents during project construction. These CMU’s shall be approved as to style and location by the local Postmaster General of the United States Post Office. The Applicant shall provide permanent mailboxes or other acceptable permanent means of receiving mail for project residents, which shall be approved as to style and location by the local Postmaster General of the United States Post Office. Post Office authorization shall be forwarded to the ZBA for their record.
- C.7 The Applicant shall be responsible to ensure that nuisance conditions do not exist in and around the Site during the construction operations. The Applicant shall at all times use all reasonable means to minimize inconvenience to residents in the general area.

- C.8 Hours – The hours of operation for any construction activities on-site shall be between 7:00 am and 7:00 pm, Monday thru Friday, 8:00 am and 5:00 pm on Saturdays, and no work shall be allowed on-site on Sundays or on Holidays as recognized by the Commonwealth of Massachusetts.
- C.9 Dust – The Applicant shall implement dust control operations, in an approved manner, whenever necessary or when directed by the Building Commissioner of the Town Engineer, even though other work on the Project may be suspended as a result thereof. Methods of controlling dust shall meet all air pollution standards as set forth by Federal and State regulatory agencies.
- C.10 Noise – The Applicant shall implement measures to ensure that noise from project construction activities does not exceed acceptable levels, as set forth by Federal and State regulatory agencies. The Applicant shall cease any excessively loud activities when directed by the Building Commissioner.
- C.11 Vibration – The Applicant shall implement necessary controls to ensure that vibration does not extend beyond the subject Site and create a nuisance or hazard for property abutters. The Applicant shall cease any activities that cause excessive vibration when directed by the Building Commissioner.
- C.12 Traffic – The Applicant shall implement necessary traffic safety controls to ensure a safe and convenient vehicular access in and around the Site. Any traffic problems that occur as a result of site operations and construction shall be mitigated immediately, at the expense of the Applicant. Additional traffic mitigation measures may be required as necessary, or as directed by the Building Commissioner.
- C.13 Roads – The Applicant is responsible for the sweeping, removal of snow, and sanding of the internal roadways permitting access to residents and emergency vehicles during construction and until the Condo Association has been legally established and has assumed said responsibilities.
- C. 14 Burial of any stumps or debris onsite is expressly prohibited. Localized burial of stones and/or boulders is prohibited to prevent the creation of voids from soil settlement over time.
- C.15 Soil material to be used as backfill for pipes, roads, and/or structures shall be tested at the expense of the Applicant, by a firm selected by the ZBA. Testing of said backfill shall be performed in conformance with standards and frequencies established by the Building Commissioner.
- C.16 Utilities, including but not necessarily limited to electric, cable and telephone shall be located underground. A final utility plan approved by the applicable public utilities shall be submitted to and approved by the ZBA prior to the issuance of any building permits.

- C.17 Stabilization Requirements – No building areas shall be left in an open, unstabilized condition longer than sixty (60) days. Temporary stabilization shall be accomplished by hay bales, hay coverings or matting. Final stabilization shall be accomplished by loaming and seeding exposed areas.
- C.18 Construction vehicles shall be parked on the Site and off Prospect Street at all times.
- C. 19 Blasting – A licensed blasting professional shall do all blasting on the Site after proper pre-blast inspections have been conducted and all required permits have been obtained from the Acton Fire Department. Pursuant to MGL Chapter 148 §19, before the issuance of a permit to use an explosive in the blasting of rock or any other substance at the Site, the applicant for the permit shall file with the Acton Town Clerk a bond running to the Town, with sureties approved by the treasurer of the Town, in the penal sum as the officer granting the permit shall determine in accordance with §19 to be necessary in order to cover the risk of damage that might ensue from the blasting or its keeping therefor.

D. Legal Requirements

- D.1 The Applicant shall establish a condominium owners' association (the "Condo Association") that will be governed and controlled by the provisions of a condominium Master Deed and By-Laws. The Applicant shall provide in the Master Deed and/or the Condominium Trust that a separate reserve shall be maintained specifically for repairs to, replacement of, and maintenance of, the common drainage systems for the Project and the off-site (K-Mart site) drainage maintenance that shall be the responsibility of the condominium association (see Condition I.4). The Condominium Master Deed and Declaration of Trust shall be subject to approval by Town Counsel to ensure consistency with this decision. The Applicant shall deposit \$1,000 in the ZBA's consultant fee account prior to the issuance of any occupancy permit to cover the ZBA's legal expenses in reviewing the condominium documents.
- D.2 Any sale or transfer of rights or interest in all or any part of the Site shall include a condition that successors are bound to the terms and conditions of this Comprehensive Permit. This Comprehensive Permit may not be transferred to a person other than the Applicant, or to an entity of which the Applicant controls less than 50%, without the written approval of the ZBA and the execution of any instruments or documents such as may be required to assure the perpetual enforcement of this Comprehensive Permit pursuant to Town Counsel's direction. The scope of the ZBA's review of a proposed transfer shall be limited to the review of the transferee's qualifications, experience, and capacity.
- D.3 The Applicant and/or subsequent Owner(s) shall be bound by all conditions and requirements set forth in this Comprehensive Permit. The Master Deed shall

reference and be subject to this Comprehensive Permit Decision. The Master Deed shall be recorded at the Middlesex South District Registry of Deeds and filed with the Middlesex South District Land Court Registration office as applicable. Proof of recording and filing, as applicable, shall be forwarded to the Building Commissioner prior to issuance of any occupancy permit.

- D.4 In setting the percentages of beneficial interest in the condominium common areas in the Condominium Master Deed, the Applicant shall ensure that the percentages assigned to the Affordable Units reflect the fair market value of the Affordable Units, taking into account the affordable housing restrictions that encumber said Units.
- D.5 The roadways, utilities, drainage systems, and all other infrastructure shown in the Approved Plan shall remain private. The Town of Acton shall not have, now or ever, any legal responsibility for the operation or maintenance of this Infrastructure (see H.1), including but not limited to snow removal and trash collection.
- D.6 If rights to use the “Abandoned Road” are asserted in a manner that may prevent construction or residential use of the Project as shown in the Approved Plans, the Applicant shall undertake to relocate any easement for said rights on the Site so as to permit the exercise of the rights in a manner consistent with construction and residential use of the Project as outlined in M.P.M Builders, LLC v. Dwyer, 442 Mass. 87, 809 N.E. 2nd 1053 (2004).
- D.7 The Applicant shall ensure that title insurance be made available to purchasers of all condominium units in the Project at the purchasers’ expense as set forth in paragraph 26 of this Decision. If title insurance that complies with this condition ceases to be available, that lack of availability shall constitute a project change and the provisions of 760 CMR 31.03(3) shall be applied including prompt notification of the ZBA.
- D.8 The Project shall be limited to 12 units that shall consist of 2 units that contain 2 bedrooms each and 10 units that contain 3 bedrooms each.

E. Traffic and Safety Conditions

- E.1 The Applicant shall provide a safe school bus stop area near the Prospect Street entrance to the Site for children who reside in the Project.
- E.2 Traffic signage shall be consistent with the requirements of the current edition of the Manual for Uniform Traffic Control Devices.
- E.3 Appropriate driveways, sidewalks and curbing, sufficient for the safe separation of pedestrians from moving vehicles, shall be provided throughout the Site to

allow safe vehicular and pedestrian access within the Site and between all units, as shown on the Plans.

- E.4 The Applicant shall install a stop sign and a pavement stop bar control of exit movements from the Project Driveway's "T" intersection with Prospect Street.
- E.5 All such improvements shall be completed in accordance with the standards set forth in the most recent edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD), and shall be in place prior to project occupancy.
- E.7 The existing driveway on the Site shall be removed as part of construction of the Project.
- E.8 Each building and unit in the Project shall be equipped with fire detection systems and shall comply with the applicable state Building Code and Fire Safety Code provisions. The fire detection system for each building and unit in the Project shall be subject to the approval of the Fire Chief consistent with his authority under said Codes.
- E.9 The Applicant shall obtain approvals from the Engineering Department, Police Chief, and Fire Chief on the street address of the condominium.
- E.10 The central fire alarm call box for the condominium shall be located in an area acceptable to the Fire Chief.

F. Landscaping Conditions

- F.1 Prior to the issuance of the final occupancy permit, the Applicant shall have fully completed the improvements and plantings shown on the Landscaping Plan, dated July 31, 2006.
- F.2 The Applicant shall provide a passive recreational area behind building #3 as shown on the Approved Landscape Plan, and further shown on the detail prepared by Kim Ahern Landscape Architects, submitted as public hearing Exhibit 85. The Applicant shall ensure that the recreational area is accessible by physically handicapped individuals.
- F.3 The common area landscaping shall be maintained in perpetuity by the condominium association, which obligation shall be incorporated in the condominium documents and the declaration of restrictive covenants to be executed by the Applicant pursuant to Condition L.7 below. Dead or diseased plantings shall be replaced as soon as possible in accordance with growing and weather conditions.

- F.4 Prior to commencing construction, the Applicant shall offer to the Board of Selectmen of the Town of Acton, maintenance and improvements to the landscaping of the Blanchard Monument parcel (owned by the Town of Acton) consistent with the Project. Said maintenance shall be performed in an appropriate manner that is consistent with landscaping maintenance of the rest of the Project; this shall include mowing the lawn and trimming shrubs, if any. The legal instruments establishing the condominium association shall require the condominium association to continue said maintenance of the Blanchard Monument parcel landscaping as donated by the Applicant to the Town of Acton

G. Affordability Requirements

To the extent permitted by the DHCD, the following conditions shall apply. The Applicant shall support the Town in obtaining the DHCD's approval of the following conditions:

- G.1 Affordable Units: To the extent permitted by the DHCD: Three (3) of the units within the Project shall be designated Affordable Units and each Affordable Unit shall be sold to a household earning no more than 80% of the Area Median Income as published by the Department of Housing and Urban Development (HUD) for the Boston-Cambridge-Quincy MA-NH HUD Metro Fair Market Rent Area. One of the Affordable Units shall contain two bedrooms and two of the Affordable Units shall contain three bedrooms.
- G.2 Sale Prices: The maximum sale prices for the Affordable Units shall be reviewed and approved by the DHCD at the time of the lottery for selection of buyers of the Affordable Units. Subject to the approval of the DHCD, the sale price for the Affordable Units shall be set to be affordable to a household earning 70% of the Area Median Income, adjusted for household size. The applicable household sizes are three (3) persons for the 2-bedroom unit and four (4) persons for the 3-bedroom units. The maximum sale prices for the Affordable Units shall be reviewed and approved by the Monitoring Agent. Subject to DHCD approval, the Monitoring Agent shall initially be the Acton Board of Selectmen or its designee (the "Monitoring Agent"). Any modification or deviation from the designation of affordable units as originally proposed and reviewed by the DHCD shall be subject to approval by the DHCD.
- G.3 Selection of Buyers for Affordable Units: The Applicant shall obtain the DHCD and Monitoring Agent approvals of a buyer selection plan for the sale of the Affordable Units prior to conducting the buyer selection process for the Affordable Units. Buyers shall be selected through a fair lottery process (the "Lottery"). To the maximum extent permitted by law and by the DHCD, first preference for the purchase of two of the three Affordable Units shall be given to households that meet one or more of the following "Acton Connection" preference criteria:

- a. Currently a legal resident of the Town of Acton. For purposes of the Lottery, a person shall be deemed a resident if that person has been registered as an Acton resident with the Acton Town Clerk pursuant to MGL Chapter 51, §4 and would be considered a resident under the United States Census Bureau's residency guidelines. ("Usual residence" has been defined as the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence. Also, non-citizens who are living in the United States are included, regardless of their immigration status.)
- b. A son or daughter of an Acton resident.
- c. An employee of the Town of Acton, the Acton Public Schools, the Acton-Boxborough Regional School District, or the Acton Water District, and has been an employee for a period of at least six months at the time of the Affordable Unit lottery application deadline.
- d. Currently privately or publicly employed within the Town of Acton and has been so employed for a period of at least six months at the time of the Affordable Unit lottery application deadline.

Purchasers whose selection is based on any of the above "Acton Connection" preference criteria shall continually meet at least one of these criteria from the time of selection to the time of closing on the purchase of an affordable unit. Such a purchaser's failure to meet at least one of these criteria during this time period shall be a cause for that purchaser's disqualification and selection of a new purchaser in accordance with the procedures of the Lottery.

Within a pool of potential buyers, first preference shall be given to households requiring the total number of bedrooms in the Unit with at least one occupant and no more than two occupants per bedroom.

The selection of purchasers for the Affordable Units, including the administration of the Lottery, shall be administered by a consultant retained and funded by the Applicant. The Lottery shall be implemented pursuant to a Lottery Plan developed by the lottery consultant and approved by the DHCD and the Monitoring Agent. The Monitoring Agent shall oversee the lottery. The Applicant shall fund the expenses of the Lottery, and deposit \$500 in an account established by the Monitoring Agent to cover its expenses in overseeing the lottery.

Selected purchasers shall complete a first-time homebuyer course prior to closing on the purchase of an affordable unit. The Applicant shall request that the DHCD make available a list of such courses for purchasers to attend.

Income eligibility shall be governed by the rules and regulations of DHCD under the Local Initiative Program, or in default, the rules and standards employed by the Department of Housing and Urban Development in the selection of income-eligible households for publicly subsidized housing.

Disputes concerning income qualification and Acton Connection qualification shall be resolved in the first instance by the Monitoring Agent. A party aggrieved by a qualification-related decision of the Monitoring Agent may appeal the decision to the ZBA for a final determination.

The provisions of this section are intended to complement and not to override or supersede any rules, regulations, or requirements of the Department of Housing and Community Development, the Massachusetts Commission Against Discrimination, the Local Initiative Program, or any authority with jurisdiction and like purpose, to provide low and/or moderate income housing.

G.4 Phasing-in of Affordable Units: Affordable Units shall be sold contemporaneous with the market-rate units in the Project. No more than three certificates of occupancy shall be issued by the Building Commissioner for units designated for sale at fair market prices (the “Market Rate Units”) until at least one certificate of occupancy is issued for an Affordable Unit. The proportion of Market Rate Unit certificates of occupancy issued to Affordable Unit certificates of occupancy issued shall at no time exceed 3:1.

G.5 Perpetual Affordability Restriction: Prior to the issuance of any building permits, a Regulatory Agreement, in a form acceptable to the DHCD shall be executed and recorded. The Regulatory Agreement shall provide, among other things, that (a) sale and resale of 25% of the units in the Project shall be subject to a Deed Rider, in a form acceptable to the DHCD, and (b) the Project Owner’s profit shall be limited to 20% of the total development cost of the Project as defined by the Regulatory Agreement and applicable regulations. The Applicant shall support the Town’s efforts to obtain DHCD approval of the Regulatory Agreement in the form marked as public hearing Exhibit 81.

The Deed Rider attached to the Regulatory Agreement as Exhibit C and marked as public hearing Exhibit 81a shall be attached to and recorded with the Deed for each and every Affordable Unit in the Project at the time of each sale and resale, and the Deed Rider shall restrict each such affordable unit pursuant to this Decision in perpetuity in accordance with the requirements of MGL Chapter 184, §§31-33³.

³ Pursuant to MGL Chapter 184 §31, an affordable housing restriction means “a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, mortgage, will, agreement, or other instrument executed by or on behalf of the owner of the land appropriate to (a) limiting the use of all or part of the land to occupancy by persons or families of low or moderate income in either rental housing or other housing or (b) restricting the resale

In any event, as this Decision grants permission to build the Project under the comprehensive permit statute, MGL Chapter 40B, §§20-23 (the “Act”), and as the Applicant has obtained the benefits of a comprehensive permit, the Project shall remain subject to the restrictions imposed by the Act so long as the Project is not in compliance with the Town of Acton’s zoning requirements which otherwise would be applicable to the Site and the Project but for the comprehensive permit’s override of local bylaws to promote affordable housing. Accordingly, this Decision and the Deed Rider shall restrict each such Affordable Unit so long as the Project is not in compliance with the Town of Acton’s zoning bylaw, so that those units continue to serve the public interest for which the Project was authorized⁴. It is the express intention of this Decision that the period of affordability shall be the longest period allowed by law.

- G.6 Profit Cap: To conform to the intent of the Act that profits from the Project be reasonable and limited, the Applicant shall be limited to a profit cap of twenty percent (20%) of total development costs of the Project, as accepted by the DHCD (the “Profit Cap”). The Applicant shall cause a certified public accountant (“Applicant’s CPA”) to review the financial records of the Revised Project to determine whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision. The Applicant’s CPA shall submit to the Board and the DHCD a CPA certification that either the Applicant has conformed to the Profit Cap, or certifying the actual profit from the development. If the Applicant has exceeded the 20% Profit Cap, the Applicant shall donate the excess profit above the Profit Cap to the Town of Acton to be used in the discretion of the Board of Selectmen for the express purpose of promoting, encouraging, creating, improving or subsidizing the construction or rehabilitation of affordable housing in the Town of Acton. The Applicant shall deposit \$4,500 in an escrow account set up by the Town pursuant to MGL Chapter 44, §53G to cover the Town’s expenses in monitoring compliance with the Profit Cap. Any funds not expended after the

price of all or part of the property in order to assure its affordability by future low and moderate income purchasers or (c) in any way limiting or restricting the use or enjoyment of all or any portion of the land for the purpose or encouraging or assuring creation or retention of rental and other housing for occupancy by low and moderate income persons or families” (emphasis added).

⁴ See *Zoning Board of Appeals of Wellesley V Ardemore Apartments Limited Partnership*, 436 Mass. 811(2002) (“[I]t is anomalous to suggest, as the owner does, that the legislation provides a temporal, short-term fix of insufficient affordable housing at the expense of local autonomy. Rather, the Act reflects a legislative intent to provide an incentive to developers to build affordable housing in cities and towns that are deficient in affordable housing, and a developers commitment to help a city or town achieve its statutory goal is the *raison d’être* for the override of inhibiting zoning practices. But if housing developed under a comprehensive permit is ‘affordable’ only temporarily (fifteen years in this case, according to the owner), a city or town may never achieve the long-term statutory goals: each time an affordable housing project reverts to market rentals, the percentage of low income housing units in a municipality decreases, the percentage of market rate units increases, and access to a new round of comprehensive permits is triggered. We see nothing to suggest that the Legislature had in mind such an endless revolving cycle, or contemplated that over time an ever increasing number of multi-family buildings could be constructed on vacant land and then subtracted from a town’s statutory goal.”)

completion of the Town's determination of compliance with the Profit Cap shall be returned to the Applicant.

In determining whether the Applicant has conformed to the Profit Cap requirements of this Comprehensive Permit Decision, the Applicant's CPA shall be required to certify that: (a) the total profit to the Applicant does not exceed twenty percent (20%) of total development costs of the Project, exclusive of development fees; (b) the Applicant has not made unreasonable or excessive payments (i.e., payments in excess of reasonable industry standards applicable to an arm's length transaction) to the Applicant or to its parents, subsidiaries, affiliates, successors, and assigns, or to their respective partners, limited partners, shareholders, managers, or other owners, or to the relatives of the same in connection with work performed on the Project in order to artificially inflate the costs of development of the Project; (c) there have been no commissions charged on the affordable units which are required to be sold pursuant to a lottery selection process as provided by this Comprehensive Permit; and (d) the Applicant's CPA has been provided access by the Applicant to any reasonable financial information necessary to make these determinations and to verify whether the income and expenses of the Project, including without limitation land acquisition costs, construction costs, landscaping costs, and other expenses, represent fair market value for such items, with particular attention to those arrangements between parties with overlapping ownership to owners of the Applicant..

To the extent permitted by the DHCD, all reasonable costs of enforcement of this Profit Cap condition, including legal fees incurred by the ZBA and/or the Town of Acton, shall be borne by the Applicant.

- G.7 DHCD and Financial Information: The Applicant shall forward to Town copies of all correspondence, documents, and information by and between the Applicant and the DHCD. Further, without limiting the foregoing, in addition to the Applicant's obligations to the DHCD, if the Town is not the monitoring agent with respect to determining the Project's profit: (a) upon issuance of a final certificate of occupancy for all of the Units, the Applicant shall deliver to the Town an itemized statement of the Project's total development costs and gross income certified by a certified public accountant and every ninety (90) days thereafter until the last unit is sold; and (b) the Applicant shall provide any back-up and supporting documentation, including, but not limited to, cancelled checks, invoices, receipts, and financial statements, reasonably requested by the Town for all Project costs and income sources.
- G.8 The Market Rate Units and the Affordable Units shall be indistinguishable from the exterior. To satisfy the requirement that the Affordable Units shall be evenly distributed throughout the Project, the Affordable Units shall be those units designated as units 3, 6, and 9 on the Approved Plans. In addition, all Affordable

Units must contain complete living facilities including but not limited to a stove, kitchen cabinets, plumbing fixtures, washer/dryer hookup, operational HVAC, and other amenities all as more fully shown on the final Approved Plans.

H. Surety & Covenants

- H.1 As security for the completion of the infrastructure related to the Project as shown on the Approved Plan, including, but not limited to, the roadway, sidewalks, parking areas, common areas, drainage facilities, utilities, landscaping, recreational area, and any other specific infrastructure shown on the final Approved Plans (the "Infrastructure"), the release of occupancy permits for all housing units and the sale of all housing units in the development shall be subject to the following restrictions:
- a. No occupancy permit for a unit in any building shall be issued, and no sale of any unit shall be permitted, until: (1) the base and binder course for the driveway and parking areas shown on the Plan has been installed; (2) all Infrastructure described herein and as shown on the Plan has been constructed or installed so as to adequately serve said building, provided however, that the final coat of pavement for the driveway and parking areas need not be installed in order to obtain occupancy permits for the first 2 buildings constructed; and (3) all conditions of this Comprehensive Permit that require action or resolution by the Applicant prior to the issuance of occupancy permits have been completed to the satisfaction of the Building Commissioner. The roadway, common parking areas, individual driveways and all remaining Infrastructure must be fully completed and installed prior to the issuance of occupancy permits and the sale of any units in the 3rd building constructed.
 - b. No occupancy permit for a unit in any building shall be issued, and no sale of any unit shall be permitted, until the Plan has been endorsed by the Board. This Comprehensive Permit shall be referenced on the Plan prior to endorsement by the Board.
 - c. No occupancy permit for a unit in any building shall be issued, and no sale of any unit shall be permitted, until all necessary easements have been conveyed to the Town in a form satisfactory to the Board, and evidence of recording of such easements is provided to the Building Commissioner.

I. Drainage Conditions

- I.1 Stormwater shall be managed in accordance with the Massachusetts Stormwater Policy Manual dated March, 1997 as prepared by the Massachusetts Department of Environmental Protection and Massachusetts Office of Coastal Zone Management.

- I.2 All stormwater drainage basins shall be located as to facilitate the maintenance and operation of the basins or drainage utility.
- I.3 The Applicant shall maintain and repair the drainage structures and stormwater management system on the Site as shown on the Plans until such time as the Applicant either (1) sells the Site to a new Applicant subject to these responsibilities or (2) assigns or otherwise transfers these responsibilities to the Condominium Association. The Condominium Association Bylaws shall include an adequate plan for maintenance of the stormwater management system.
- I.4 The Applicant shall clean and maintain in proper working order the drain on K-Mart property that drains the vernal pool, including obtaining permits from MassHighway that are necessary therefor. This obligation to clean and maintain this drain shall be delegated to the condominium association via the legal instruments that establish that association, see Condition D.1.
- I.5 The increase in height of the stone wall on north side of the Site is to be based on the existing wall, and is to be constructed of free stone in a fashion that allows water infiltration through the wall. A concrete wall, a concrete block wall, use of mortar, and any other construction techniques that would render the wall impervious are prohibited.

J. Parking

- J.1 The Project shall provide for on-site parking as shown on the Amended Plan, and each Affordable Unit and each comparable Market Rate Unit shall have the same reasonable access to on-site parking.
- J.2 No on-site parking shall be sold to, rented to, licensed to or otherwise conveyed to persons who are not occupants of premises located on the project Site.
- J.3 All parking spaces shall conform to the requirements of the Acton Zoning Bylaw, Section 6.7.

K. Outdoor Lighting

- K.1 The Applicant shall comply with Outdoor Lighting site design standards for site plan special permit as set forth under Section 10.4.3.2 of the Acton Zoning Bylaw, however, any future change to the outdoor lighting shall comply with the site plan special permit design standards in force at the time of the change.
- K.2 The Applicant's proposed outdoor lighting schedule as shown on the Landscape plan dated February 7, 2006, and by public hearing Exhibit 28, post light specification, is approved.

L. Wetlands Protection

- L. 1 The final comprehensive permit plan shall delineate the 50-foot no-disturb and 75-foot no-structure setback distances from the vernal pool under the Superseding Order of Conditions, the 20-to-25-foot no-structure setback distance from the wetlands along the southern portion of the Site and all limits of clearing.
- L.2 Prior to any site clearing or any other pre-construction activities on the Site, the Applicant shall mark the limits of clearing as set forth in this Decision physically on the Site using delineation methodology acceptable to the Conservation Commission
- L.3 The applicant shall fully comply with the vernal pool setbacks in the Superseding Order of Conditions, and shall comply with a 25-foot no-structure wetlands setback for the remaining wetlands on the Site with the exception of the areas bounded by Wetlands Flags (WFs) 4 and 6, WFs 11 and 13, and WFs 16 and 18, where the setback shall be reduced to the distance to the retaining wall shown on the Approved Plans, which shall not be less than 20 feet. Drainage outlets may be built within this wetlands setback in the vicinity of WFs 4, 7, and 12, as shown on the final Approved Plan. The Applicant shall use best efforts to minimize intrusion into and disturbance of the area within the wetlands and vernal pool setbacks, including disturbance caused by drainage outlet construction.
- L.4 The Project shall comply with the Superseding Order of Conditions. No structures shall be built within 75 feet of the vernal pool, and no grading or land alteration shall occur, within 50 feet of the vernal pool in accordance with the Superseding Order of Conditions as shown on the final Approved Plan.
- L.5 Within 12 months of this permit becoming final as defined in Condition O, the Applicant shall perform a clean-up of the vernal pool, with work to be preferably performed at the driest part of late summer and with work to be accomplished primarily by hand under the supervision of the Town of Acton Conservation Agent.
- L.6 Prior to the start of construction, staked hay bales and a silt fence shall be installed along the limit-of-work line shown on the Approved Plans. The hay bales and silt fence shall be maintained in functional condition until the Project is sufficiently completed and the vegetation on disturbed areas sufficiently established so that drainage of silt and sedimentation into the wetlands and vernal pool is no longer an issue. Special Condition 23 in the Superseding Order of Conditions applies to any failure of the hay bales and silt fence to contain silt and sedimentation and prevent erosion.
- L.7 Prior to the issuance of any occupancy permits, the Applicant shall record a declaration of restrictive covenants, in a form subject to the approval of Town

Counsel, that restricts any further construction or disturbance within the 50 foot no-disturb zone surrounding the vernal pool as delineated on the Plan, and prohibits any construction within the 75 foot no-structure zone. The declaration shall in addition restrict further construction or disturbance within a 25 foot buffer zone on the wetlands on the southern portion of the Site, with the exceptions that a) the 25-foot zone shall be reduced to not extend beyond the retaining wall in the area between WFs 4 and 6 and in the area between WFs 11 and 13, and b) that necessary maintenance and replacement drainage structures within the zone and the supporting pole near WF 17 within the zone shall be allowed. The declaration of restrictive covenants shall further require maintenance of the common areas in accordance with Condition F.3.

- L.8 Once the Project is constructed, the undisturbed areas to the rear of the project shall be protected from further disturbance by installing boulders along the limit-of-work line from a 25 foot offset from WF 17 at the southeast corner of building #3 to the end of the limit-of-work line at the property line near WF 37. The line of boulders shall further extend westward from WF 37 along the boundary line shown on the Plans to meet the existing stone wall to the north of Building #3. The boulders shall be 3-4 feet in diameter, buried to one-half their depth, 5 feet on center.
- L.9 The Applicant shall continue to research commercially available alternatives to the use of sand and salt for deicing the access drive and visitor parking spaces in the Project. The Applicant shall present these options to the ZBA for review prior to finalization of the legal instruments establishing the condominium association. The legal instruments establishing the condominium association shall direct said association to consider using one or more alternative options to minimize the environmental impact of salt and sand and shall require the condominium association to do continued research. Said research shall include review at least annually of Mass Highway and DEP guidelines for deicing chemical usage in sensitive areas.

M. Sewage Treatment

- M.1 All units in the Project shall be connected to the Town of Acton's municipal sewer system as shown on the final Approved Plan. This requires payment of sewer privilege fees to the Town of Acton.
- M.2 The sewer privilege fee for each Unit shall be paid prior to the issuance of any building permit for the building containing the Unit. The sewer privilege fee for each Affordable Unit shall not be passed along as a cost to the ultimate buyer of said Affordable Unit.
- M.3 The Applicant shall obtain all necessary permits for connection of the Project to the Acton municipal sewer system including those permits necessary to excavate

Prospect Street to install the connection.

- M.4 No Unit in the Project shall ever be converted, altered or expanded to add bedrooms. The number of bedrooms per unit shall be clearly identified in the Master Deed, and the Regulatory Agreement with respect to the Affordable Units. The Master Deed may not be amended to increase the number of bedrooms in any Unit, or to increase the number of Units. This restriction shall be expressly noted on all deeds for all Units in perpetuity.

N. Material Changes

If, between the date this Decision is filed in the office of the Acton Town Clerk and the completion of the Project, the Applicant desires to change in a material way and/or to a significant degree the proposed Project as reflected in and approved by this Decision, such changes shall be governed by 760 CMR 31.03(3). In no case shall the Applicant be allowed to implement a Project change that increases the number of units, changes the mix of affordable and market rate units, or increases the height of the buildings on the Site, without submitting a new application and undergoing a new public hearing and decision process. Without limitation, in the event any subsequent permitting process (such as amending the Superseding Order of Conditions to conform to the Project as approved, groundwater discharge permit review of the Project by DEP, or any other state or federal governmental approvals) results in a change to the Approved Plans that triggers the need for further waivers from local bylaws, rules, or regulations, any such matter shall be treated as a project change and the procedures in 760 CMR 31.03(3) shall be followed.

O. Expiration Date

If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written decision is filed in the office of the town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The ZBA may grant an extension of the three year lapse date for good cause shown, which shall include without limitation delay (notwithstanding the Applicant's diligent efforts) in the issuance of a governmental permit or approval or delay occasioned by a third party appeal of a governmental permit or approval required for the Project.

P. Notice to Abutters

At least seven days prior to the start of construction, the Applicant shall provide written notice to the ZBA and to the residential abutters of the Project of the anticipated construction start date and the anticipated construction schedule.

Q. Self-Correcting Provision

In the event a typographical error renders this Decision and the final Approved Plans inconsistent as to the number of units, number of bedrooms, or similar objective characteristic of the Project, the provisions of the final Approved Plans shall control on the point of inconsistency. Otherwise this decision shall be given full force and effect on its terms, unless amended by the ZBA in writing.

XII. CONCLUSION

The Application for a comprehensive permit for the Project is granted for the reasons stated above subject to the conditions provided herein.

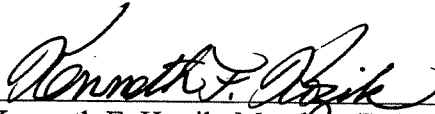
On September 27, 2006, the Acton Zoning Board of Appeals adopted this Decision by a vote of two in favor (Acting Chair Black and Member Kozik) with one opposed (Alternate Member Sawyer).

This concludes the Decision of the Board.

THE ACTON ZONING BOARD OF APPEALS



David L. Black, Acting Chair (In Favor)



Kenneth F. Kozik, Member (In Favor)



William C. Sawyer, Alternate Member (Opposed)